

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:MAN:2:TL-N-2695-01
VATaverna

date:

to: Henry Singelton, Territory Manager, Financial Services
Attn: Revenue Agent Bruce Danz, Group 1101

from: Area Counsel, (Financial Services) (Area 1 - Manhattan, NY)

subject: [REDACTED], a General Partnership
Form 872 - Tax Year [REDACTED]

Consent to Extend the Statute of Limitations on Assessment
Statute of Limitations Expires

Form 1042: [REDACTED]

Form 1120: [REDACTED]

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-17, 7701.00-00

This memorandum responds to your request for assistance on how the Internal Revenue Service can enter into a valid agreement to extend the statute of limitations on assessment with [REDACTED]. Additionally, you have also requested that we provide you with the appropriate language to use on Forms 872 (Consent to Extend the Time to Assess Tax) to extend the statute of limitations on the assessment of income tax of [REDACTED] and assessment of withholding tax of [REDACTED]. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, on this advice.

Issues

1. Which entity is the proper entity to extend the statute of limitations to assess income tax against [REDACTED] for the taxable year ended [REDACTED]?

2. Which entity may extend the statute of limitations to assess withholding tax against [REDACTED] for the taxable year ended [REDACTED]?

3. Who is the proper person(s) to execute Forms 872 on behalf of [REDACTED] for the taxable year ended [REDACTED]?

4. What specific language should be used on the Forms 872?

Facts

The Large and Mid-Size Business Operating Division (Financial Services) is currently auditing the taxable year ending [REDACTED] of [REDACTED]. For this taxable year, [REDACTED] (EIN [REDACTED]), a Delaware general partnership, elected to be treated as a corporation for Federal tax purposes, pursuant to Treasury Regulation § 301.7701-3 by filing a Form 8832 (Entity Classification Election).¹ [REDACTED] was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates for the taxable year [REDACTED]. Additionally, for the taxable year ended [REDACTED] [REDACTED] filed a form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons. Both returns were executed by [REDACTED], [REDACTED]'s Director of Taxation.

On [REDACTED], [REDACTED] changed its name to [REDACTED]. On [REDACTED], [REDACTED] filed a Statement of Dissolution of General Partnership and dissolved pursuant to the Delaware Revised Uniform Partnership Act. The Plan of Liquidation and Dissolution (the "Plan") provided that all the assets of [REDACTED] shall be distributed to [REDACTED], a Luxembourg entity and general partner of [REDACTED]. According to the Plan, [REDACTED] would complete winding up its affairs by [REDACTED].

On [REDACTED], the Examination Team obtained Forms 872 to extend the statute of limitations on the assessment of income tax of [REDACTED] and assessment of withholding tax of [REDACTED] executed by [REDACTED]. On [REDACTED], [REDACTED] was fired from his position as Tax Director and no longer has any association

¹ Our advice does not include whether [REDACTED] was eligible to elect to be treated as a corporation or whether it properly elected to be treated as a corporation under the check-the-box regulations.

with [REDACTED] or any affiliate of [REDACTED]. When [REDACTED] executed the Forms 872, he was still employed by [REDACTED].²

Discussion

Preliminary Matters

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual ("IRM"). Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer in some other written form of the I.R.C. § 6501(c)(4)(B) requirement.

Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to

² We have not had the opportunity to review the executed Forms 872. These forms should conform with the advice set forth in this memorandum. We will gladly review the executed Forms 872 upon request.

document your actions in this regard in the case file.

Issue 1. The proper entity to execute a Form 872 for assessment of income tax for [REDACTED]

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment can be found in the consolidated return regulations. Treas. Regs. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of income tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

[REDACTED] changed its name to [REDACTED]. Under the Delaware Revised Uniform Partnership Act § 15-802(a), [REDACTED] continues to exist after its dissolution for the purpose of winding up its business affairs. Accordingly, [REDACTED] is the proper entity to execute the Form 872 on behalf of itself and the members of the

consolidated group.

Issue 2. The proper entity to execute a Form 872 to extend the statute of limitations on the assessment of [REDACTED]'s withholding tax liability.

[REDACTED] continues to exist after dissolution for the purpose of winding up its business affairs. Accordingly, [REDACTED] is the proper entity to execute the Form 872 to extend the statute of limitations for assessment of [REDACTED]'s withholding tax liability.

Issue 3. The proper person(s) to execute Forms 872 on behalf of [REDACTED] for the taxable year ended [REDACTED]?

Section 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. The regulations under I.R.C. §6501(c)(4) do not specify who may sign consents. Accordingly, the Service applies the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, Section 6062 of the Internal Revenue Code provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. §6064. Accordingly, [REDACTED] may sign the Forms 872. Obviously, since [REDACTED] no longer works for [REDACTED], he does not have the authority to sign future consents.

Issue 4. The specific language that should be used on the Forms 872?

The caption of the Forms 872 extending the statute of limitations for [REDACTED] for the [REDACTED] taxable year should read as follows:

Form 1120

" [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED] (EIN [REDACTED])) *"

*This is with respect to the consolidated return liability of [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]) (EIN [REDACTED]) for the [REDACTED] taxable year.

Form 1042

"[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]) (EIN [REDACTED]) *"

*This is with respect to the withholding tax liability for U.S. source income of foreign persons of [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]) (EIN [REDACTED]) for the [REDACTED] taxable year.

The above paragraphs beginning with the "*" should be placed in the bottom margin of the first page of the Forms 872.

The EIN of [REDACTED] should be entered in the upper right hand corner of the Forms 872.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Should you have any questions regarding this matter, please contact Viviana Taverna of this office at (212) 264-1595, ext. 211 or Paul I. Darcy at (212) 264-5473 ext. 256.

ROLAND BARRAL
Area Counsel
Financial Services, Manhattan

By: _____

Viviana A. Taverna
Attorney